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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1857

HYMAN-MICHAELS COMPANY and
LAKES SHIPPING & TRADING COMPANY
Petitioners,

v.

NATIONAL CARGO BUREAU, INC.,
Respondent.

No. 1897

HYMAN-MICHAELS COMPANY,
Petitioner,

v.

NATIONAL CARGO BUREAU, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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EXPLANATION—REFERENCE GUIDE

In Respondent's Brief there are page references to:

1. The trial transcript which are designated as (R);

2. The Joint Appendix, filed in the Circuit Court of Appeals which are designated as (a);

3. The Supplemental Appendix attached to Appellee's Brief, filed in the Circuit Court of Appeals, which are designated as (c);

4. The Appendix attached to the Petition for Writ of Certiorari which are designated as (aa).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1837

HYMAN-MICHAELS COMPANY and
LAKES SHIPPING & TRADING COMPANY
Petitioners,

v.

NATIONAL CARGO BUREAU, INC.,
Respondent.

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NATIONAL CARGO BUREAU, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENT'S COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHEN A DEFENDANT VOLUNTARILY SETTLES PLAINTIFF'S CLAIM DURING TRIAL, WITHOUT, AT THE TIME OF SETTLEMENT, FIRST OFFERING THE THIRD PARTY DEFENDANT THE OPPORTUNITY TO TAKE OVER DEFENSES, DOES THIRD PARTY PLAINTIFF HAVE THE BURDEN OF PROVING THAT HE WAS ACTUALLY LIABLE TO THE PLAINTIFF AS A CONDITION PRECEDENT TO ESTABLISHING A RIGHT OF INDEMNITY AGAINST THE THIRD PARTY DEFENDANT?[1]

II.

DID THE COURT OF APPEALS ERR IN HOLDING THAT THE FINDINGS OF FACT MADE BY THE DISTRICT COURT WERE NOT CLEARLY ERRONEOUS AND SUPPORTED THE CONCLUSION (phrased in contract terms) THAT NATIONAL CARGO WAS NOT LIABLE FOR ITS BREACH OF CONTRACT BECAUSE THE INJURY TO THE SHIP AND ITS CARGO WAS UNFORESEEABLE?[2]

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[1] This question relates only to the jury case because in the Judge-tried case the District Judge found N.C.B. not liable for other reasons.

[2] This question would not apply to the jury case; its significance, if any, would be in connection with the Judge-tried case.

STATEMENT OF THE CASE

For the purpose of consideration of this Petition, and excepting as hereinafter indicated, Respondent, National Cargo Bureau (hereinafter referred to as N.C.B.) accepts Petitioner's Statement of the case.

EXCEPTIONS:

1. The 130° F referred to in 46 C.F.R. 146.27-100 is advisory and refers to the temperature of turnings on the dock and not aboard the ship (R 8617, 8618, 8619, 8621).

2. The Coast Guard Regulations were complied with. (61aa).

3. While the Gyda was in Detroit and in Montreal, the Shipowner and Petitioner employed experts (not N.C.B.) to advise concerning the cargo heating. (141a, 155a, 158a, 159a, 169a, 228a, 229a, 185a, 188a, 189a).

4. Temperatures moderated while the vessel was in Detroit. (58aa).

5. Damage to the ship in Montreal was slight. (191a).

6. The District Judge held that the N.C.B.-Hyman contract related to activities in Muskegon only. (39aa).

7. The District Judge also held that the N.C.B. was not liable for the breach of its contract in Muskegon, because the damage (expressed in contract terms) was not reasonably foreseeable, on account of all the occurrences between 6-18 and 7-14-61 while the ship (Gyda) was enroute from Muskegon to Philadelphia. (58aa, 59aa).

REASONS FOR NOT GRANTING THE WRITS

I.

THERE IS NO REAL OR EMBARRASSING CONFLICT OF OPINION AND AUTHORITY BETWEEN THE CIRCUIT COURTS OF APPEAL.

Petitioner opens its argument by stating:

> "The various Courts of Appeal are at hopeless odds as to the requirements which must be met by an indemnitor proceeding on a theory of indemnity based upon a contract." (Petition for Writ, at p. 10).

Petitioner concludes its argument by stating:

> "One Court of Appeals has now written an entirely new condition into what had heretofore been accepted law, given, of course, notice and the opportunity to defend. The point needs clarification". (Petition for Writ, at p. 17).

Respondent does not believe either of these statements are correct. Respondent does not believe there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal. Such a conflict is a condition precedent to the granting of the Writ. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S Ct. 422, 423, 67 L Ed 712; F.R.C.P. 19(b).

Petitioner contends that the law in several Circuits is different than the law enunciated by the Sixth Circuit in 406 F. 2d 1039 (14aa), and Petitioner cites ten cases in

support of its contention.[3] Respondent respectfully submits that these cases are not in conflict with the Sixth Circuit's ruling. The several cases cited by Petitioner are distinguishable.

Waterman v. *Dugan*, 364 U.S. 421 didn't deal with the necessity of defense tender. It dealt with the necessity of a direct contractual relationship between the shipowner and the stevedore and rules that such a relationship was not necessary. The holding is not in conflict with the Sixth Circuit Court of Appeals holding in 406 F. 2d 1039. (14aa).

Rederi A/B Dalen v. *Maker*, 303 F 2d 565 (C.C.A. 4) involved a situation where the third party defendant stevedore, during trial, settled with the plaintiff and then sought to avoid indemnity for attorney fees. The Sixth Circuit was dealing with an entirely different situation in 406 F 2d 1039. (14aa).

Jennings v. *U.S.* 374 F 2d 983 does not support Petitioner's position but rather Respondent's position, and the Sixth Circuit Court of Appeals so held. (21aa, 22aa)

> "The indemnitee's unilateral acts, albeit reasonable and undertaken in good faith, cannot bind the indemnitor; notice and *an opportunity to defend* are the indispensable due process satisfying elements". (374 F. 2d at 986) (emphasis added)

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[3] *Dramanti* v. *A/S Inger*, 314 F 2d 395 (C.C.A. 2, 1963), cert denied 375 US 834; *West Coast Terminals Co. of Calif.* v *Luchenbach SS Co.*, 349 F 2d 568 (C.C.A. 9, 1965); *California Stevedore & Ballast Co.* v. *Pan-Atlantic Steamship Cor.*, 291 F 2d,, 252 (C.C.A. 9, 1961); *Chicago R.I. and P.R. Co.* v. *Dobry Flour Mills*, 211 F 2d 785 (C.C.A. 10, 1954), cert. denied 348 U.S. 382; *Jennings* v. *U.S.* 374 F 2d, 983 (C.C.A. 4, 1967); *St. Louis Dressed Beef Co.* v. *Maryland Casualty Co.*, 201 U.S. 173; *Chicago* v. *Robbins*, 67 U.S. 418; *Waterman Steamship Co.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421; *Rederi A/B Dalen* v. *Maker* 303 F 2d 565 (C.C.A. 4, 1962); *Moses-Ecco Co.* v. *Roscoe-Ajax Corp.*, 320 F 2d 685 (1963).

The other cases cited by Petitioner are not applicable and were distinguished by the Court of Appeals either because the third party was tendered the defense and refused it (22aa); or because the claim for indemnification was founded on a judgment and actual liability had been established (22aa); or because the defendant's claim against the third party was founded upon a written contract of insurance or indemnification where the insurance company or indemnitor agreed to defend or to pay damage claims against another (22aa).

The Court of Appeals was correct in holding that the general rule is that an idemnitee must show actual liability to recover against the indemnitor (21aa)[4], and that there was no reason for departing from this rule because Hyman had not tendered the defense, and by so doing had not afforded N.C.B. the opportunity of asserting Hyman's defense to the plaintiff's action as provided for by F.R.C.P. 14 (24aa). The inconvenience that might be caused in requiring tender is not sufficient to deprive Respondent of its rights under F.R.C.P. 14.

II

THERE IS NO MATTER OF GENUINE PUBLIC INTEREST AT STAKE; PETITIONER MAKES NO CLAIM THAT FINDINGS OF FACT WERE CLEARLY ERRONEOUS; PETITIONER SIMPLY DISAGREES WITH THE FINDINGS OF FACT MADE BY THE DISTRICT COURT WHICH WERE AFFIRMED BY THE COURT OF APPEALS.

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[4] The Toledo, 122 F. 2d 255 (2nd Cir.), cert. denied, *Isbrandtsen-Moller Co.* v. *The Toledo*, 314 U.S. 689, 62 S. Ct. 302, 86 L. Ed. 55 (1941); *Jennings* v. *United States*, 374 F. 2d 983 (4th Cir. 1967); *Nelson* v. *Sponberg*, 51 Wash. 2d 371, 318 P. 2d 951 (1957); *Dunn* v. *Uvalde Asphalt Paving Co.*, 175 N.Y. 214, 67 N.E. 439 (1903); *Donald* v. *Guy*, 127 F. 228 (E. D. Va. 1903).

Petitioner does not state a reason to support the granting of a Writ. Petitioner does not demonstrate how a matter of public interest is involved. Petitioner does not contend that the conclusions of law and/or fact are clearly erroneous.

Petitioner is simply voicing disagreement with the District Court's and the Appeal Court's interpretation of the evidence so as to conclude that N.C.B. was not liable for breach of its contract because the damage was not reasonably foreseeable. The evidence showed that the damage was remote in time and space from the breach and that there were a number of intervening events, besides the Captain's applying water to the cargo. (7aa, 10aa, 11aa, 58aa, 59aa).

Petitioner should be estopped from criticizing the District Court's terminology because Petitioner actively contributed to the District Judge's use of this language, (11aa) for instance, by submitting Requests to Charge which used the terms "proximate cause". (368c, 369c, 370c).

Further, the selection of technically incorrect language ("proximate cause" rather than "unforeseeable") by the District Court is not a reason for reversal or remand because if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. *Frey & Son* v. *Cudahy Packing Co.*, 256 U.S. 208; *United States* v. *American Ry. Express Co.*, 265 U.S. 425; *United States* v. *Holt State Bank*, 270 U.S. 49, 56; *Langnes* v. *Green*, 282 U.S. 531; *Stelos Co.* v. *Hosiery Motor-Mend Corporation*, 295 U.S. 237, 239; cf. *United States* v. *Williams*, 278 U.S. 255; *Helvering* v. *Gowan*, 302 U.S. 238; *Riley Co.* v. *Commissioner*, 311 U.S. 55.

CONCLUSION

Examination of the cases relied upon by Petitioner will demonstrate that there is not an embarrassing conflict between the Circuit Courts of Appeal.

Petitioner's Reason II is not a valid reason for granting of the Writ, because a matter of public interest is not involved; and because the findings below are not clearly erroneous; and because the giving of a wrong reason for a correct result is not a basis for reversal or remand.

Respectfully submitted,
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